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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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Implementation of the Local Competition Provisions
in the Telecommunications Act of 1996

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CC Docket No. 96-98

PETITION FOR RECONSIDERATION AND CLARIFICATION

In accordance with Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a) (1994) and the Commission's regulations, 47 C.F.R. § 1.429, Delmarva Power & Light Company ("Delmarva") hereby requests reconsideration and clarification of the Commission's Order in the above-captioned docket. Delmarva participated in this rulemaking by filing Comments and Reply Comments to the Commission's Notice of Proposed Rulemaking in the above-captioned docket adopted April 19, 1996. Those Comments and Reply Comments addressed implementation of Section 224 of the Communications Act of 1934 -- the pole attachment provisions -- as amended by Section 703 of the Telecommunications Act of 1996. Similarly, this petition seeks reconsideration and clarification of aspects of the Commission's First Report and Order ("FR&O") released August 8, 1996, relating to nondiscriminatory access to a utility's poles, ducts, conduits and rights-of-way addressed at Section XI.B of the FR&O.

I. INTRODUCTION

Delmarva Power & Light Company is an investor-owned utility which provides electric service in Delaware, Maryland, primarily ten Eastern Shore counties, and the Eastern Shore of

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Virginia. The Company also provides gas service to retail and transportation customers in northern Delaware and has recently begun to explore telecommunications business opportunities. Delmarva's electric transmission and distribution system includes more than 1,300 transmission poleline miles of overhead lines, approximately 7,100 distribution poleline miles of overhead lines, and more than 5,200 distribution cable miles of underground cables. Delmarva accordingly has a vital interest in this rulemaking.

As an initial matter, Delmarva notes that the Commission has recognized the myriad situations that may arise in the context of providing cable television systems and telecommunications carriers access to a utility's poles, ducts, conduits and rights-of-way. Delmarva applauds the Commission's use of general guidelines for accomplishing statutory goals, rather than prescriptive rules, to give utilities, cable television systems and telecommunications carriers flexibility to reach agreements on access to the utility's facilities without the need for regulatory intervention. Certain aspects of the Commission's rules and general guidelines, however, fail to recognize day-to-day utility operations and for the reasons stated below Delmarva hereby requests reconsideration and clarification of the following matters addressed in the FR&O.^{1/}

^{1/} In addition to filing this petition for reconsideration and clarification, Delmarva hereby adopts and incorporates the Joint Petition for Reconsideration and/or Clarification of the Edison Electric Institute and UTC, The Telecommunications Association in this docket.

II. REQUEST FOR RECONSIDERATION AND CLARIFICATION

A. For Reasons of Safety, A Utility Should Be Allowed Broad Discretion To Regulate Conditions Of Access to Underground Facilities

Under Section 224(f)(2) of the Communications Act, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 224(f)(2), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis, if there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes. As the Commission noted, in enacting this provision, Congress acknowledged the importance of safety in the transmission and distribution of electricity. These safety issues are of particular concern with respect to underground ducts and conduits, and utilities generally have not authorized anyone other than utility personnel to access those facilities. The FR&O explicitly rejects this practice and the Commission has concluded that electric utilities may not require cable television systems and telecommunications carriers to use contractors hired or pre-designated by the utility for installation of cable television or telecommunications equipment in utility manholes. Recognizing the dangers involved in transmission and distribution of electricity, the Commission has stated that a utility may require a party seeking access to use individuals who work in proximity with electric lines to have the same qualifications and training as the utility's own workers, but that such party should be able to use any individual workers who meet these criteria.

The Commission's position, however, leaves two important questions unanswered. First, who establishes the qualifications that the individual worker must have in order to work in close proximity to electric lines and cables? Second, who decides if the individual worker meets those

qualifications? In the absence of a clear statement by the Commission on this issue, numerous disputes between cable television and telecommunications providers and electric utilities will arise. The primary reasons for an electric utility to restrict access to ducts and conduits via its manholes are safety and reliability. The inherent dangers of work with high voltage cables are compounded in the confined space of a manhole. Permitting workers insufficiently trained and experienced with electricity and without knowledge of the utility's electric transmission and distribution system to have access to manholes to install telecommunications equipment is an invitation for disaster. At a minimum, the utility must be allowed to establish the qualifications which workers must have to gain access to underground facilities and must be permitted to decide whether the individual worker meets those qualifications. The most efficient means for a utility to ensure that only qualified workers gain access to underground ducts and conduits is to designate contractors sufficiently skilled and knowledgeable about the utility's system which a cable television system or telecommunications carrier may use, with supervision from the utility, for equipment installation. The Commission should clarify the FR&O to make clear that utilities are empowered to establish reasonable worker qualifications and to enforce them.

B. The Commission Should Not Require Utilities To Exercise Eminent Domain For The Benefit Of Third Parties

In promulgating the FR&O, the Commission wisely recognized that requests for access to the poles, ducts, conduits, and rights-of-way of a utility would raise numerous issues that are likely to vary from utility to utility and region to region and that each type of facility presents its own unique concerns. Accordingly, the Commission refrained from attempting to establish rigid rules applicable to all situations. The Commission's position regarding the exercise of eminent

domain, however, while acknowledging that exercise of such authority is a matter of state law, fails to take into account the variety of approaches the states have taken with respect to utilities and eminent domain. Specifically, the Commission has determined that a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access. This position ignores the fact that in some states, such as Delaware, electric utilities do not have general eminent domain authority. Under Delaware law, a utility is permitted to condemn property for transmitting electricity only under limited circumstances, such as along a public highway. 26 Del. C. § 901; Delaware Power & Light Company v. Terry, 194 A.2d 553, 557 (1963), aff'd, 200 A.2d 423 (1964). The Commission's blanket assumption that all electric utilities are authorized to exercise eminent domain authority, and, therefore, should be expected to exercise such authority for cable television systems and telecommunications carriers, simply creates expectations that utilities may not be in a position to satisfy. The Commission should reconsider its position that utilities must exercise the power of eminent domain on behalf of telecommunications carriers.

C. A Utility Should Be Permitted To Reserve Space In Underground Ducts And Conduits For Its Core Utility Business

In its initial Comments in this docket, Delmarva urged the Commission to permit electric utilities to retain reasonable reserve capacity to support existing and future needs. In addition, with respect to conduit systems, Delmarva noted the importance of reserved conduit space to address cable failures. If a cable in a conduit fails, the most expeditious way to return customers to service is the installation of a new cable in an adjacent conduit. After service has been restored

the utility can remedy the fault in the failed cable, or remove the old cable from service. A utility's ability to reserve conduit space for such repairs is vital to reliable electric service.

The Commission's FR&O permits an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of core utility service. The utility, however, is required to permit cable operators and telecommunications carriers to use the reserved space until the utility has an actual need for that space. The Commission's position in this regard fails to acknowledge the importance of reserved duct and conduit space to a utility's ability to provide reliable electric service. While a utility should not be permitted to hoard excess conduit space, a utility must be permitted to install, maintain and reserve for its own use sufficient space in a duct or conduit for its core utility business to enable return of service to customers in a timely fashion in order to meet its public service obligation. The Commission should clarify the FR&O to this effect.

D. The Commission Should Clarify The Meaning of "Utility" As Defined In Section 224(a)(1)

The nondiscriminatory access provisions of Section 224(f) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, apply to any utility. Under the statute, a utility is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). In implementing these statutory provisions, the Commission determined that in using the phrase "in whole or in part" Congress sought to preclude a utility from providing access only to the exact utility path used for wire communication. The Commission also concluded that use of any utility pole, duct, conduit,

or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communication.

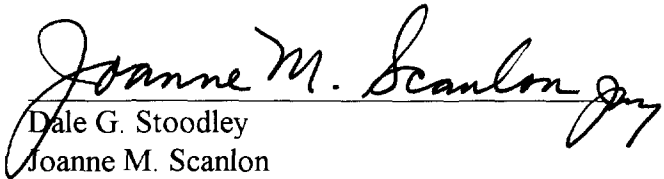
Delmarva requests clarification of the Commission's intention regarding the lengths to which a utility must go in order to comply with this interpretation of statutory requirements. Specifically, based on the Commission's conclusion, a cable operator or telecommunications carrier could demand that a utility install poles, ducts, or conduits on a completely undeveloped utility right-of-way in order to accommodate the telecommunications' provider simply because the utility may own poles with wire communications attachments somewhere in its electric utility system, Delmarva questions whether such a result was intended by Congress or the Commission. The Commission should clarify its interpretation to ensure that a utility is not required to create infrastructure on unimproved rights-of-way solely for the benefit of cable television and telecommuni-

III. CONCLUSION

The Commission's decision to establish guidelines for the provision of nondiscriminatory access to poles, ducts, conduits, and rights-of-way to cable television systems and telecommunications carriers by electric utilities affords flexibility for the parties to reach agreement on the conditions for access. The FR&O leaves questions regarding each party's rights and obligations in some situations unanswered, however, and for the reasons described above, Delmarva requests reconsideration and/or clarification of certain aspects of the FR&O.

Respectfully submitted,

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